

The Kafkaesque Edifice of Law

Maksim Karliuk

2020-08-07T21:23:38

“From a certain point onward there is no longer any turning back. That is the point that must be reached.”

Franz Kafka, *The Trial*

Primer on Belarusian elections

The current presidential campaign has already been described as a “[révolution de femmes](#)” by *Le Monde* and echoed with “[an ordinary Belarusian wife looking after her two children \[...\] posing the greatest threat to an authoritarian rule](#)” by the *Financial Times*. The improbable presidential candidate [Sviatlana Cichanouskaja](#) (or Tsikhanouskaya) decided to run in the campaign in place of her husband Siarhiey Cichanouski (or Tsikhanouski). He and two other increasingly popular alternative candidates – Viktor Babaryka (or Babariko) and Valery Capkava (or Tsepkalo) – were not allowed to compete for office, all for different reasons. They were unusually hard challengers for the current autocratic ruler Aliaksandar Lukashenka (or Lukashenko), who is running for his sixth consecutive term following his 26 years in power.

Cichanouskaja has been [joined](#) by two other women: Vieranika Capkava (or Tsepkalo) – the wife of the respective ex-candidate – and Maryja Kalechikava – the coordinator of Babaryka’s campaign staff. The three of them now symbolize the aspirations for change. But before we unpack the story, let’s have a quick look at how Belarusian elections typically function.

Elections and referenda in Belarus have not been recognized as free and fair by the major international institutions since 1996, when the [Constitution](#) was amended substantially and [redistributed powers](#) in favor of the President (only to be amended again in 2004 to eliminate the two-term limit for presidency). The Organization for Security and Co-operation in Europe (OSCE), which always sends observers through its Office for Democratic Institutions and Human Rights (ODIHR), has routinely described the electoral process as having “[fundamental flaws](#)”, “[serious violations](#)”, “[fail\[ing\] to meet OSCE Commitments for democratic elections](#)”, and assessing the vote count as “[bad and very bad](#)”. On the other hand, observers from the post-Soviet Commonwealth of Independent States (CIS) are [usually happy with the electoral process](#). This time, unlike the CIS, which [has sent its observers again](#), OSCE observers have not come due to the “[lack of a timely invitation](#)”. There is, however, unprecedented activity in internal observation followed by similarly intense measures to resist it (see next section).

While it is not uncommon in Belarus to arrest opposition candidates after elections, what is striking about the present campaign is that the imprisonment has happened

even before they could officially become candidates. The extent of political imprisonment in Belarus is one of the reasons why the authorities have been under restrictive measures [imposed by the EU](#) since 2004. Only the presidential elections of 2015 took place in an improved climate of EU-Belarus relations and were accompanied by the [suspension of the EU restrictive measures](#) following the release of political prisoners.

2020 electoral (r)evolution

For the last 26 years, the Belarusian president has secured sweeping victories at the elections. This time, however, three extremely popular candidates have emerged almost out of nowhere: entrepreneur-turned YouTube blogger Cichano#ski, Belarusian hi-tech park founder and former diplomat Capka#a, and banker and philanthropist Babaryka. They are all very different but very appealing to various categories of citizens, among others, because of their demonstrated competences, approaches to people, and visions for the future.

But such popularity is also fueled by high anti-ratings of the current President. Unofficial online surveys, before they were banned, showed approval ratings of the present leader around [3%](#). Such polling is far from representative, but it generally indicated huge dissatisfaction with the authorities, and the number quickly became a meme. The reasons for the low popularity are subject to speculation, but a lost decade of stagnation is definitely not helping: [GDP is around the same](#) as in 2010. This has been fueled by the President's denial of the scope and seriousness of the COVID-19 pandemic and lack of support and compassion for citizens (see the analysis [here](#)).

In this context, an unprecedented legal creativity had to be deployed to disqualify the strongest contenders from the race. Babaryka was denied registration as presidential candidate based on vaguely defined accusations (see below). Furthermore, having collected unprecedented numbers of signatures in his support, more than a half of them were [invalidated](#) without proper evidence and procedure. Based on the [responses](#) of the Central Electoral Commission (CEC), there seems to be no legal avenue for a person to challenge the alleged invalidity of their signature. Babaryka's lawyer qualified this and similar situations as a '[legal default](#)'.

Capka#a was not registered because more than half of the signatures he submitted were [invalidated](#) in a similar manner. Paradoxically, some other less popular contenders ended up with more signatures approved by the CEC than what they [submitted](#). Cichano#ski was barred from the race even earlier – at the stage of initiative group registration. He was placed under administrative arrest following a poorly orchestrated [provocation](#) and could not apply in person. The CEC [did not allow](#) his wife Cichano#skaja to apply on his behalf, despite having power of attorney, and so she decided to replace him as a candidate. She was hardly viewed as a real competitor to begin with, and even less so after the arrest of her husband and other members of her team, and was allowed to run. Moreover, the President argued that the Constitution of the Republic of Belarus is [not suitable for women](#) to run the country.

Belarusians, in turn, demonstrated an unprecedented level of civil involvement in the 2020 electoral process. Many tried to become members of electoral commissions, in most cases unsuccessfully (independent members now constitute only [about 0,04%](#)). Following that, record numbers of people applied to become observers, which was [a little more successful](#) despite massive administrative obstacles, but [insurmountable challenges](#) have been put in place to limit any viable possibility to carry out the duties. Extraordinary numbers attended Cichano#skaja's rallies [across the country](#) and in [Minsk](#). Since opinion poll surveys in Belarus can be organized essentially only by state-controlled institutions, many digital initiatives and exit polls have appeared this year to ensure [an alternative vote count](#) in Belarus and [abroad](#).

The rule of no law

One of the many things that are different about the campaign of alternative candidates this time is the elaborate use of all possible legal means, mechanisms and remedies to claim and defend the rights available within the legal system. Although there were no illusions from the outset about law in books being anywhere close to law in action, this exercise has uncovered (and allowed to document) the truly impudent Kafkaesque nature thereof.

Unprecedented use of available legal tools has been possible thanks to a rather strong team of lawyers, particularly on Babaryka's side, which include, among others, [Maksim Znak](#) and [D#mitry Laje#ski](#) – prominent partners of local law offices. Conducting legal practice in these political realities is a risky business that not everyone is ready to undertake or even be associated with, as a number of lawyers [walking out of a law firm](#) has shown.

Such foundational legal notions as presumption of innocence, right to counsel, right to effective judicial protection and fair trial, just to name a few, start vanishing rather quickly under certain conditions. Presidential elections are certainly one such condition. When Babaryka was detained, his lawyers were [denied access](#) to him for no apparent lawful reason. They were [denied access again](#) when he was moved to the KGB detention center citing “epidemiologic situation”. When they were allowed access, volunteers had to [wait in overnight lines](#) in order for lawyers to be able to see the client. At the time of writing, the grounds for detention are unknown and the charges are still unclear. All of it is undergoing never-ending complaint procedures through the Prosecutor General's Office and judiciary. We do not know what is happening during the criminal proceedings, which are constantly being appealed against. This is because the lawyers were forced to sign confidentiality statements, while state TV demonstrates videos of proceedings, interviewing the prosecution and providing commentaries, which blatantly violate presumption of innocence and regulations on access to such materials.

Nevertheless, a person can still run for President unless imprisoned following a court ruling (Art. 64 of the Constitution). However, the CEC denied Babaryka's registration as presidential candidate based on a letter from the State Control Committee, supreme audit institution accountable to the President, alleging violations, which were not confirmed by proper documents and judicial decisions, and which no one

has seen, including Babaryka and his lawyers. Such a letter could have hardly been legal grounds for refusal in the first place. It is particularly telling that every single member of the CEC has a law degree, and the Minister of Justice Aleh [#liže#ski](#) (or [Slizhevsky](#)) himself is a member thereof. The Supreme Court [declined](#) to review the complaint filed by Babaryka's lawyer on the grounds that the electoral legislation does not provide a possibility for the complaint to be filed by a legal representative, albeit with the relevant power of attorney, instead of the defendant himself. When Babaryka managed to send the complaint from behind bars, the Supreme Court, demonstrating wonders of ingenuity and evident reluctance to ensure review, [ruled](#) that the time limit was over, and it was not possible to restore it. The same court [ruled](#) against Capka#a regarding invalidated signatures. Cichano#ski is regularly put in the isolation ward, which is mostly perceived as uncalled for, and he [fails to challenge](#) it in the courts.

The Constitution provides for judicial independence (Art. 110). Such independence is clearly [undermined](#) by the President's role in, and control over, the selection, appointment, reappointment, promotion and dismissal of judges. Therefore, independent judicial review of any of the measures adopted can hardly be ensured.

Many people, including the 2015 Nobel Prize laureate [#viat#ana Aleksijevi#](#), tried to submit personal guarantees for Babaryka so that preventive measures against him are changed. However, many of them never managed to do so – while submitting the documents, they were detained directly in the KGB premises without reasons. Some even appeared before [the court and were sentenced](#).

One aspect that is particularly worrying in this campaign is that authorities exercise pressure on contenders through their family members, in particular children. Babaryka's adult son is [detained on unclear grounds](#) similar to his father. Cichano#skaja had to [hide her young children abroad](#) after having received threats. Capka#a had to [flee the country together with his young children](#) after having received information about authorities' plans to arrest him and deprive him and his wife of parental rights.

(This paragraph has been added to the article after the first version was published.)

Not many international mechanisms are available to defend rights and freedoms in Belarus. The country is not a member state of the Council of Europe and therefore there is no access to the European Court of Human Rights. Babaryka's lawyers eventually [filed a complaint](#) with the United Nations Human Rights Committee claiming violation of Art. 9 of the International Covenant on Civil and Political Rights due to arbitrary detention.

Instead of conclusions: the Constitution

The events that have been unfolding during this presidential campaign are hard to reconcile with Art. 2 of the Constitution, which provides that “the individual, his rights, freedoms and guarantees for their attainment are the supreme goal and value of society and the State.” Be mindful that, although important ones, we have covered

only a handful of “irregularities” that occurred. It is beyond the scope of this piece to provide a review of these irregularities, but many more have occurred, hundreds of people being [randomly detained on the streets](#) while peacefully expressing their views, [riding a bike](#) or just [standing in the line](#) to a souvenir shop, and being fined or arrested following a trial with little semblance of fairness, just to name a few. Even the preterm nature of the elections is constitutionally [questionable](#).

After Babaryka was detained, his campaign staff proposed holding a referendum to return to the original version of the Constitution of 1994. This would restore the limitation of presidential terms, rebalance the powers and improve their separation, among many other things. This initiative has already encountered [resistance](#) from authorities. Interestingly enough, the President himself has been contemplating changes to the Constitution [since at least 2016](#), and has now [reiterated](#) such plans again. The exact nature of his proposals is unknown, but they are surely not about substantially altering the *status quo*.

It is far from clear whether constitutional change will improve anything in terms of law in action. Even the initial version of the Constitution would hardly be perfect since it was elaborated in the circumstances right after the fall of the USSR. What is evident, though, is that there is a need for a clear break from the Kafkaesque edifice built upon and sustained by the bedrock of the document in force, the culmination of which has manifested itself in the presidential elections of 2020.

